Supreme Court of the United States.

No. 203.

EMERY D. CHAPIN AND NOAH D. NASH, PLAINTIFFS IN ERROR,

against

LEONARD TOWNE, JR., AND GEORGE M. WASHBURN,

DEFENDANTS IN ERROR.

ABSTRACT OF CASE AND BRIEF OF DEFT'S. IN ERROR.

J. DOWNER,

Att'y. for Defendants in Error.

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Plaintiffs in error,

against

LEONARD TOWNE, JR., and GEORGE M. WASHBURN,

Defendants in error.

ABSTRACT OF THE CASE.

The defendants in error brought an action of assumpsit, against the plaintiffs in error, in the Circuit Court to recover damages for the non-delivery of one thousand barrels of flour, bought by Towne & Washburn of Nash & Chapin, and paid for by them, by accepting and paying the draft of the defendants in error on them for $5,500. The declaration as amended contained a special count, and the common and money counts, and on the back of it was a bill of particulars. The defendants below

plead the general issue to the whole declaration; and at the trial, the jury found a verdict for the plaintiffs below, for $6,120.59, on which judgment was entered.

The bill of exceptions contains only a small part of the evidence.

At the trial the plaintiffs below offered and read in evidence a letter admitted to have been sent to them by the defendants with a bill of sale therein enclosed. The bill of sale was for one thousand barrels of flour at five dollars and fifty cents, ($5,500,) and receipted as paid by sight draft. The letter among other things stated in substance Nash & Chapin had sold Towne & Washburn the flour mentioned in the bill, free on boar dsteamer at Neenah for five dollars and fifty cents per barrel, and that they had the flour stored and insured and would value on them at sight.

This evidence was objected to because it proved a different contract from that set out in the special count and was inadmissible under the other counts. The objection was overruled and the defendants below excepted. The plaintiffs then proved a demand for the flour before suit brought and a refusal by the defendants below to deliver it; also facts tending to prove that the flour they bought was one thousand barrels set apart from all other flour and stored alone, there being no other flour in the warehouse where it was stored. The defendants below at the trial offered to prove that they in selling the flour acted as agents for one Burdick, and told one of the plaintiffs so at the time of the sale; and that they paid over the money, the proceeds of the sale to Burdick. This was objected to because it was conversation prior to or contemporaneous with the written contract (the bill of sale and letter) and would modify or contradict it, and alter the liability of the defendants under that contract. The objection was sustained and the ruling excepted to.

The following instructions (inter alia) were given:

That if the jury found from the evidence that the plaintiffs had paid money to the defendants for a consideration which had failed, and which in equity the defendants ought to pay back, their verdict must be for the plaintiffs. (Excepted to.) And if they found said defendants executed the bill of sale and letter or contract read in evidence, and the plaintiffs paid them for the flour specified, five thousand, five hundred dollars, and the defendants afterwards failed and refused to deliver the flour

when demanded, then their verdict should be for the plaintiffs for the amount paid by them and interest, unless the defendants delivered to, and the plaintiffs accepted the warehouse receipts in evidence in lieu of the flour. (Excepted to.)

2 The court at the request of the defendants below, plaintiffs in error, charged the jury, "that the plaintiffs cannot recover in this cause against the defendants damage for the conversion of that flour without proof that the defendants have after such conversion, sold the flour and received pay for it, and in that case, for only the amount actually sold, and paid for, and only the price paid to them," and the court added "the converse of such instruction is also true; that if the jury find from the evidence that the defendants had sold said one thousand barrels of flour or any part of it, and had received the money therefor, or the benefit of such sale and payment thereof, then their verdict should be for the amount so received by said defendants unless they had delivered to the plaintiffs and the plaintiffs had accepted the warehouse receipts as a delivery of the flour."

BRIEF OF DEFENDANTS IN ERROR.

We know not what points the plaintiffs in error will present. We presume the same as were urged in the Circuit Court.

1st. That the plaintiffs below could recover only on the special count; and could not prove a special agreement different from that set out in the special count under the money counts. But the law is clearly otherwise. See authorities cited to the second point.

2nd. The plaintiffs in error say that the court erred in giving the first instruction. We understand the law differently. The first part of the instruction lays down a general rule, and the last part applies it to the particular facts of this case. The instruction was correct. Randlet or Herran, 20 N. H. Rep. 103, Murray or Richards, 1 Wend. 58, Frost vs. Clarkson, 7. Cow. 24, Danforth vs. Dewey, 3 N. H. 79, Smith's Leading Cases, (Hare & Wallace's Notes,) vol. 2, page 41 Giles vs. Edwards 7 T. R. 181. The jury found for the money paid and interest, and in so doing, doubtedless followed the first instruction.

3d. It is maintained by the plaintiffs in error, that the Circuit Court erred in refusing to permit them to prove that they at the time of the sale of the flour, only acted as agents for Burdick, and so told Towne

& Washburn. This ruling was right; for the reason that the bill of sale and letter, constituted a written contract by which the defendants below had made themselves *personally* liable, whether they were or were not agents, and such written contract could not be varied or modified by prior or contemporaneous declarations. The only purpose for which the testimony was offered, was to procure the release and discharge of Nash & Chapin, from their personal liability on, or growing out of the written contract. For such purpose the testimony was not admissable.

Story on Agency, § 269 270, and following also § 279; Jones vs. Littledale, 6 Adolph & Ellis, 486; Higgins vs. Senior, 8 Mees Welsby 834 Atkins, 2 Mees. & W. 834; Stackpole vs. Arnold, 11 Mass, 27 ~~Mass. 27~~

4th. The giving of the second or last instruction is assigned for error. That instruction was to the effect that if the jury found the defendants below had sold and converted the flour or any part of it to their use and received the pay and money, therefore the plaintiffs were entitled to recover the amount so received. This was clearly correct. As all the testimony is not before the Court, it must be of course, presumed sufficient.

5th. It appears to me that the rulings of the Court below are so clearly right, that the writ of error should be regarded as prosecuted *merely for delay*, and the judgment of the Circuit Court be affirmed with *ten per centum* damages.

JASON DOWNER,
Attorney for defendants in error.